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September 7, 1993

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

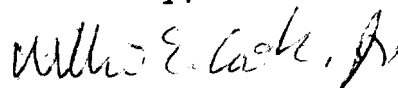
Re: Antitrafficking Petition
for Reconsideration,
MM Docket No. 92-264

Dear Mr. Caton:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et al., an original and eleven copies of a Petition for Reconsideration and Clarification by the National Association of Telecommunications Officers and Advisors, et al., in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,



William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of
Sections 11 and 13 of the
Cable Television Consumer
Protection and Competition
Act of 1992

MM Docket No. 92-264

TO: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION BY
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF
CITIES, THE UNITED STATES CONFERENCE OF MAYORS,
AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications
Officers and Advisors, the National League of Cities,
the United States Conference of Mayors, and the National
Association of Counties (collectively, the "Local
Governments") hereby submit this Petition in the above-
captioned proceeding.

I. INTRODUCTION

Local Governments believe that, in general, the
antitrafficking rules the Federal Communications
Commission ("Commission") adopted to implement Section
617 of the Cable Television Consumer Protection and
Competition Act of 1992 (the "1992 Act"),

47 U.S.C. § 537, recognize the critical role franchising authorities have in approving and disapproving transfer requests. Moreover, the Commission has granted franchising authorities an appropriate partnership role in enforcing the Commission's antitrafficking rules.

However, certain of the Commission's rules may encroach upon the traditional right of franchising authorities to review transfer requests, in contravention of the plain language and intent of Section 617. Moreover, the Commission's blanket exemption for small cable systems is not in the public interest, and undermines the intent of Section 617. Local Governments strongly urge the Commission to reconsider or clarify the rules addressed below in order to ensure that such rules do not violate or circumvent Section 617.

II. DISCUSSION

A. The 120-Day Period for Reviewing a Transfer Request Does not Begin Until Information Required by a Franchising Authority Is Submitted

Local Governments urge the Commission to reconsider its rule that permits the 120-day period to review a transfer request to begin once the cable operator submits information required by the Commission and by "the franchise agreement or applicable state or

local law."¹ The plain, clear language of Section 617(e) states, in relevant part, that "a franchising authority shall . . . have 120 days to act upon any request for approval of [a] sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." 47 U.S.C. § 537(e) (emphasis added).

The statute suggests no limit on what information a franchising authority may require a cable operator to submit prior to the start of the 120-day period. In particular, the statute does not state that a franchising authority's right to obtain information, prior to the start of the 120-day period, is limited to that information required by a franchise agreement or by state or local law.

Moreover, the rule may limit the ability of a franchising authority to fully consider whether a transfer request should be approved. Although the Commission recognizes the right of a franchising authority to request additional information it may

¹ The Commission's rule states that "[a] franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law to act upon such transfer request." 47 C.F.R. § 76.502(i)(1) (to be codified) (emphasis added).

require during the 120-day period, such a solution may not be sufficient.² The cable operator may submit, in response to an informational request, information that does not fully satisfy the franchising authority's request. Moreover, even if complete, the franchising authority may not have sufficient time to fully review the information if it is submitted late during the 120-day time period. As a result, the franchising authority may have to deny the transfer request if the transferor or transferee has not made the showing necessary to satisfy the state or local standards for approval of a transfer request.

To resolve this inconsistency with Section 617, the Commission should amend its rule to comply with the statutory language of Section 617 in the following manner:

A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required by the franchising authority, the terms of the franchise agreement or applicable state or local law, to act upon such transfer request. The 120-day period will commence once the franchising authority notifies the cable operator or the transferee that the

² See Report and Order and Further Notice of Proposed Rule Making, In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264 (released July 23, 1993) at ¶ 86 (hereinafter "Report and Order").

information required by the Commission and the franchising authority has been received.

B. A Cable Operator Seeking To Assign or Transfer a Cable System Must Obtain Franchising Authority Approval if Required By the Terms of the Franchise Agreement or Other Applicable State or Local Law or Provision

Section 617(e) states that a cable operator must obtain a franchising authority's approval to transfer a cable system "if the franchise requires franchising authority approval of a sale of transfer." (Emphasis added.) The term "franchise" is not limited simply to a franchise agreement; Congress recognized that the term encompasses, among other things, "a franchise, permit, license, resolution, contract, certificate, [or] agreement." 47 U.S.C. § 522(9).

The Commission appears to inadvertently permit a franchising authority to approve or disapprove a transfer request only if required by a "franchise agreement." 47 C.F.R. §§ 76.502(g), 76.502(i). However, a franchising authority's right to review a transfer request may not necessarily be included in a franchise agreement. A franchising authority's right to review a transfer request may arise from some other source, such as a state or local law, ordinance or other applicable state or local provision.

The Commission recognizes that the source of the right to review a transfer request is not limited to a franchise agreement in other of its antitrafficking rules. For example, the Commission recognizes that for purposes of a waiver of the three-year holding period, a small system waiver by the Commission does not become effective unless the transfer is approved by the franchising authority, "where such approval is required by the terms of the franchise agreement or applicable state or local law." 47 C.F.R. § 76.502(g)(2). See also 47 C.F.R. § 76.502(i)(1) (120-day period commences when cable operator submits information required by "the terms of the franchise agreement or applicable state or local law").

Consistent with Section 617, Local Governments request that the Commission clarify or reconsider its rules to make clear that a franchising authority has the right to review a transfer request if permitted under a franchise, or other applicable state or local law or provision.

C. Congress Did Not Intend for the Commission to Grant a Blanket Waiver for Small Systems

Local Governments urge the Commission to reconsider its blanket antitrafficking waiver for small cable systems. See 47 C.F.R. § 76.502(g)(2). The Commission has not demonstrated that such a waiver is in

the "public interest," which is the statutory standard established in Section 617(d) for granting waivers.

As the Commission recognizes, the legislative history to the 1992 Act suggests that "the antitrafficking provision was intended to restrict profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the franchise area." Report and Order at ¶ 11 (emphasis added). Hence, the grant of a "public interest" waiver should not be at the expense of these public interest goals of Section 617.

Nowhere does the Commission, in establishing the small system waiver, indicate that such a waiver will not adversely impact small system subscribers, in terms of cable rates and service. Instead, the Commission focuses solely on the impact of such a waiver on small system operators.³ Such a blanket waiver -- without any consideration whatsoever of the impact of the waiver on subscribers -- appears inconsistent with the "public interest" goals underlying Section 617.

The potential impact of the waiver on subscribers is substantial. By the Commission's own estimate, more

³ See Report and Order at ¶ 90-91 (e.g., "Since we believe that application of the antitrafficking rule to small systems would create significant financial and administrative burdens on small system operators, we conclude that a blanket waiver for small systems furthers the public interest").

than 5,000 cable systems across the country -- which Local Governments estimate to account for more than 50 percent of all cable systems⁴ -- would be entitled to this waiver. Based on the Commission's estimate that 3.6 percent of all subscribers subscribe to small systems, these small systems serve approximately 1.9 million subscribers nationwide.⁵ Assuming that small systems may be purchased at a conservative rate of \$2,000 per subscriber, these 5,000-plus small systems represent an investment of almost \$3.8 billion dollars. Hence, small systems do not represent an insignificant investment for a cable operator wishing to "traffic" in such systems.

Local Governments urge the Commission to reconsider its blanket waiver for small cable systems.⁶ Such systems should be subject to the same waiver

⁴ According to the Television and Cable Factbook, 5,815 of the 11,086 cable systems across the nation -- or approximately 52 percent of all cable systems -- serve less than 1,000 subscribers. Television and Cable Factbook G-65 (Vol. 60, Part II 1992).

⁵ According to the Television and Cable Factbook, there are 52,557,382 subscribers nationwide. Id.


⁶ Similarly, Local Governments urge the Commission to reconsider its rule providing for favorable treatment of waiver requests by MSO-owned systems. 47 C.F.R. § 76.502(g)(1). This rule would permit MSOs to traffic in up to one-third of their cable systems. The potential impact of such a waiver is even greater than that for small systems since the number of subscribers to even one-third of MSO systems significantly exceeds the number of subscribers to all small systems.

requirements imposed on other cable systems; their waiver requests should be considered on a case-by-case basis, and the public interest focus should be on subscribers, not operators. See 47 C.F.R. § 76.502(g). Congress did not intend for the Commission to circumvent the "public interest" waiver provision in Section 617(d) by granting blanket waivers to small cable systems, and thereby subject small system subscribers to less protection than that afforded to subscribers to other cable systems.

III. CONCLUSION

For the foregoing reasons, the Commission should reconsider or clarify those antitrafficking rules addressed in this Petition. The Commission should revise those rules so that they are consistent with the goals and plain statutory language of Section 617.

Respectfully Submitted,



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September 7, 1993